IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-290

AMERICAN CIVIL LIBERTIES UNION AND JANE KOE,

Petitioners,

versus

O. HARRY BOZARDT, JR., H. HAYNE CRUM, JOSEPH O. ROGERS, JR., MARION H. KINON, EDWARD M. ROYALL, II, GEORGE F. COLEMAN, ROBERT A. HAMMETT, THOMAS J. THOMPSON, COMING B. GIBBS, JR., LOWELL W. ROSS, FRANK E. HARRISON, J. MALCOLM McLENDON, C. THOMAS WYCHE, WILLIAM L. BETHEA, JOHN B. McCUTCHEON, MELVIN B. McKEOWN, JR., individually and as members of the Board of Commissioners on Grievances and Discipline, and their successors; and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-styled case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at ___ F.2d ____ and is appended hereto at 1a. The denial of the petition for rehearing and suggestion for rehearing en banc is appended hereto at 18a. The statement of Judge Winter, joined by Judges Craven and Butzner, dissenting from the denial of rehearing en banc, is appended hereto at 20a. The opinion of the United States District Court for the District of South Carolina is unreported and is appended hereto at 27a. The opinion of the district court denying a motion to alter or amend judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure is also unreported and is appended hereto at 48a.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit was entered on March 8, 1976. The time was extended for filing a petition for rehearing and suggestion for rehearing en banc, which was then filed, and the order denying such petition was filed on April 30, 1976. By order of July 23, 1976, the circuit justice extended the time for filing this petition to August 26, 1976. This court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether administrative bar disciplinary proceedings for non-criminal conduct alleged to be "unethical solicitation" are to be given the same deference under the doctrine of comity as state court proceedings for the enforcement of the policies of state criminal laws?

2. Whether bar disciplinary proceedings against one member of a private, non-profit legal service organization forecloses, under the doctrine of Younger v. Harris, the organization from seeking declaratory relief on behalf of the organization and its members against whom no state proceedings of any kind are pending?

3. Whether a complaint that alleges that state administrative proceedings were (1) instituted in bad faith, (2) instituted with a desire to harass and retaliate against the plaintiffs for engaging in constitutionally protected activity, and (3) instituted pursuant to a statute flagrantly and patently violative of express constitutional prohibitions against vagueness and overbreadth, was subject to dismissal under the doctrine of comity because it did not also allege that there was no "reasonable prospect" that the state court would correctly apply federal constitutional principles?

CONSTITUTION AND OTHER PROVISIONS INVOLVED

The constitutional provisions and other provisions of law involved in this case are set forth in full in the Appendix, p. 51a et seq., as follows:

United States Constitution, Amendment One

United States Constitution, Amendment Fourteen, §1

United States Code, Title 42, § 1983

Supreme Court of South Carolina, Rule on Disciplinary Procedure, § 4

American Bar Association, Code of Professional Responsibility, Disciplinary Rule 2-103(D)

STATEMENT OF THE CASE

Petitioners, the American Civil Liberties Union and Jane Koe [a fictitious name for a black woman attorney who was an officer of the South Carolina affiliate of the ACLU], brought this action in October, 1974, in the federal district court pursuant to 42 U.S.C. §§ 1983 and 1988, founding jurisdiction on 28 U.S.C. §§ 1331 and 1343. Petitioners sought injunctive and declaratory relief from an administrative proceeding before the Board of Commissioners on Grievances and Discipline for the bar of the State of South Carolina, in which Koe was charged with "soliciting" a client for the ACLU. Petitioners alleged that this disciplinary proceeding had been

instituted in bad faith by the Office of the Attorney General of South Carolina in retaliation for a lawsuit brought by the ACLU. That lawsuit attacked sterilizations performed by private physicians, allegedly by coercion, of minority women receiving federal and state Medicaid benefits. In that action the Attorney General represented Welfare officials who allegedly approved the practice of coercing sterilizations to be performed on Medicaid patients. This action also challenged the disciplinary proceeding as being pursuant to a vague and overbroad statute. The district court held that the action should be dismissed, both as to the subject of the Board proceedings, Ms. Koe, and as to the ACLU, which was not and could not be a party to the Board proceedings. The court of appeals, adopting the reasoning of the district court, affirmed the dismissal. 17a.

Judge Winter, joined by Judges Craven and Butzner in dissenting from the denial of rehearing en banc, found that the principles of Younger v. Harris had been improperly applied by the district court and by the panel, 20a-21a, 23a:

> [H]ere there is pending a state administrative proceeding, the object of which is to determine if the individual plaintiff should be subjected to disciplinary action, not criminal sanctions, for alleged misconduct as a member of the bar.
>
> * * *
>
> Although the district court ought not to enjoin the administrative proceedings

> unless the plaintiffs' right to relief is free from doubt, I see no basis on which to say that federal jurisdiction is ousted because the proceeding is criminal or quasi-criminal in nature. (Emphasis in original.)

Judge Winter also noted that the ACLU clearly had a legitimate standing in the case, 24a-25a:

> The impact of the state proceedings on the willingness of lawyers to volunteer and cooperate with ACLU in providing legal assistance to those whose constitutional rights have been violated is manifest. The services of ACLU--assisting lay persons to recognize their legal rights and making counsel available--are the very services for which the individual plaintiff is sought to be disciplined and they are constitutionally protected activities.

In 1973, national attention was drawn to the plight of women in Aiken County, South Carolina, by a pregnant mother who was temporarily on welfare. Every obstetrician in Aiken County required that she submit to sterilization after her delivery in order to receive care as a Medicaid patient. New York Times, July 22, 1973, p. 30. According to an affidavit filed in this action signed by another mother [Mrs. "M.W."], who was allegedly "solicited" by petitioner Koe, the following subsequently occurred:

> In July, 1973, [M.W.] met with a number of individuals including [Jane Koe] at a meeting held at the office of Mr. Gary Allen. Mr. Allen had seen her prior thereto and informed her that the meeting was for the purposes of discussing sterilizations performed by physicians in Aiken County and remedies available to women who had been sterilized, including suits for damages against the doctors involved. Desiring to learn more about her legal rights and remedies, if any, she attended the meeting and while there met [Jane Koe] for the first time.
>
> At that meeting or during conversations after that meeting, [Jane Koe] explained to her what her rights and remedies were as far as her sterilization was concerned, and informed her of her right to bring an action for injunctive relief and damages. [Jane Koe] did not, however, attempt to persuade or pressure her to file a law suit or offer to represent her for a fee or otherwise.

According to petitioners' complaint in this federal action, Gary Allen then contacted Jane Koe and asked that the ACLU represent Mrs. M.W. Jane Koe then wrote Mrs. M.W., in response to this request, that the ACLU would like to represent her in connection with her sterilization. At the instance of the attorney for the defendant physician,

Mrs. M.W. decided not to proceed with the litigation.

Two other black women who had been sterilized, or threatened with sterilization, did file a damage suit, against M.W.'s physician and Welfare Department officials, through lawyers associated with the ACLU. Doe v. Pierce, Civil Action No. 74-475 (District of South Carolina).[1] As further set forth in the complaint and other papers filed in the district court, attorneys in the office of the Attorney General of South Carolina, who were responsible both for defending state defendants in Doe v. Pierce and for prosecuting matters before the Grievance Commissioners, obtained the letter from Koe to M.W., but did not present it to the Board on Grievances and Discipline until several months later, after an unsuccessful attempt to have Doe v. Pierce dismissed on the basis of Ms. Koe's letter to Mrs. M.W. The complaint in this action specifically alleged, as must be considered true at this stage of the proceedings, that officials in the Office of the Attorney General of South Carolina referred this matter to the Board on Grievances and Discipline in retaliation for the bringing of the sterilization lawsuit.

1. Judgment for nominal damages was awarded against the physician on behalf of one woman who was prematurely discharged from the hospital when she refused to consent to sterilization after delivery. The matter is presently on appeal.

In the context of the above alleged events, the respondent Board of Commissioners, on January 9, 1976, gave Ms. Koe a private reprimand on the basis of a panel report[2] that relied upon the following rationale:[3]

> The evidence is inconclusive as to whether the Respondent solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially [by a possible award of attorneys' fees] in the event of successful prosecution of the suit for money damages.
>
> * * *
>
> [Koe] has, therefore, violated DR 2-103 (D)(5)(a) by attempting to solicit a client for a non-profit organization which, as its primary purpose, renders legal services, where [Koe's] association is a staff counsel for the non-profit organization.

Disciplinary Rule 2-103 (D), by its terms, solely prohibits an attorney from "knowingly

2. This Report was submitted to the court of appeals, which declined to consider it. 10a-11a, footnote.

3. It should be noted that the financial benefit potentially available to the ACLU -- attorneys' fees awarded, in addition to damages, by the federal court -- would be available only in circumstances of egregious misconduct by the defendants, since no federal statute authorized court-awarded attorneys' fees in such cases. Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975).

assist[ing] a person or organization...to promote the use of his services or those of his partners or associates." Ms. Koe never promoted the use of her own professional services, or those of her associates. Indeed, the uncontradicted allegations of the complaint establish that the offending letter was written at the express request of Gary Allen, whom Koe reasonably believed to be acting on behalf of Mrs. M.W.

Petitioner Koe has filed a petition with the Supreme Court of South Carolina for review of the reprimand, but, as the majority below noted, she has no right by statute or rule to such review. 12a. The State Supreme Court has not yet acted upon that petition.

REASONS FOR GRANTING THE WRIT

Ten years before this action was commenced, this Court issued its opinion in NAACP v. Button, 371 U.S. 415 (1963), which announced unequivocally that this Court would protect the rights of black minority citizens to associate to "solicit" persons to bring legal action for the redress of unconstitutional racial segregation. Petitioner Koe is a black woman attorney, a native of a rural South Carolina County adjacent to the community that spawned one of the cases decided by this Court in Brown v. Board of Education, 347 U.S. 483 (1954), the landmark desegregation decision. Viewed in context, this case is simply NAACP v. Button played over again, with the ACLU undertaking the role of allegedly "soliciting" litigation on issues of public moment.

This Court should issue a writ of certiorari to review the judgment below

because it is in conflict with prior decisions of this Court, e.g., Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); and NAACP v. Button, 371 U.S. 415 (1963). In addition, the judgment below extended the application of the doctrine of comity, an important issue of federal practice, in a manner unprecedented in the decisions of this Court and in conflict with the decisions of other courts of appeals.

I. The doctrine of comity does not require that federal courts defer, for the enforcement of federal constitutional rights, to administrative bar disciplinary proceedings concerning non-criminal conduct that is alleged to be "unethical."

A. The court below decided an important question of federal practice by an unprecedented and unwarranted extension of the application of the doctrine of comity.

Since the decision in Younger v. Harris, 401 U.S. 37 (1971), and its companion cases, this Court has on many occasions discussed the considerations of comity that have been held to prohibit the exercise of federal judicial power when state judicial proceedings are pending. Gibson v. Berryhill, 411 U.S. 564 (1973); Steffel v. Thompson, 415 U.S. 452 (1974); Allee v. Medrano, 416 U.S. 802 (1974); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Kugler v. Helfant, 421 U.S. 117 (1975); Hicks v. Miranda, 422 U.S. 332 (1975); Doran v. Salem Inn, Inc.,

422 U.S. 922 (1975). cf. Hernandez v. Danaher, 405 F.Supp. 757, prob. jurisdiction noted sub. nom Trainor v. Hernandez, 44 U.S.L.W. 3702 (U.S. June 7, 1976)(No. 75-1407); Juidice v. Vail, ___ F.Supp. ___ (S.D.N.Y. 1976), cert. granted, 44 U.S.L.W. 3734 (U.S. June 21, 1976)(No. 77-1397). To date, however, this Court has never suggested that state administrative proceedings, including disciplinary proceedings for professional misconduct were subject to the same considerations of comity unless the alleged misconduct was criminal or quasi-criminal in nature. See the opinion of Mr. Justice White for the Court in Gibson v. Berryhill, supra, 411 U.S. at 576-77, discussing this Court's summary affirmance of Geiger v. Jenkins, 401 U.S. 95 (1971), in reliance upon Younger (revocation of a license to practice medicine, where criminal proceedings were pending at time of dismissal of federal case). As the three dissenting judges noted below, 21a, 23a:

> What is at stake in the state proceedings is the right of a licensee to practice her profession; there is no claim that, if the individual plaintiff did the things with which she is charged, any criminal statute of South Carolina was infringed.
>
> * * *
>
> Although the district court ought not to enjoin the administrative proceeding unless the plaintiffs' right to relief is free from doubt, I see no basis on which to say that federal jurisdiction is ousted

> because the proceeding is criminal or quasi-criminal in nature.

There is, in fact, wholly absent in this case any effort by the State "to protect the very interests which underlie its criminal laws, and to obtain compliance with precisely the standards which are embodied in its criminal laws." Huffman v. Pursue, Ltd., supra, 420 U.S. at 605. The Supreme Court of South Carolina itself has always disclaimed any notion that disciplinary proceedings in South Carolina are criminal or even punitive. In re Kennedy, 254 S.C. 463, 176 S.E.2d 125 (1970); Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960). Petitioner Koe was not charged pursuant to Section 4(c) of the Rule on Disciplinary Procedure, which imposes sanctions for "commission of a crime involving moral turpitude." Petitioner Koe was reprimanded for violation of a Disciplinary Rule that was not mentioned in any charge or accusatory pleading until after her hearing; can the State seriously contend that a hearing using such procedures is entitled to the deference due state criminal proceedings?

In the present case, the court of appeals adopted the opinion of the district court on the Younger issue. 3a-4a, 17a. The district court did not analyze the interests involved in the South Carolina proceeding, but simply quoted at length from Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972). 39a-43a. Apparently the gist of the court's reliance on Erdmann, as applied in South Carolina, was this, 42a-43a:

> Undoubtedly because of general recognition of the advisability of permitting state courts first to act with respect to the delicate relationship between themselves and their officers, the traditional method of obtaining adjudication of federal constitutional questions arising out of such disciplinary proceedings has been by way of the state appellate court route to the Supreme Court rather than by direct federal intervention at the initial stages. 458 F.2d at 1210.

This theory is not only totally lacking in support in prior decisions of this Court, it is also inapplicable to the factual circumstance of this case. South Carolina bar disciplinary procedure provides that a private reprimand is administered by the Board of Commissioners on Grievances and Discipline, without any opportunity for judicial hearing or any specified procedure for review by the courts. Petitioner Koe received a private reprimand on January 9, 1976. As the court of appeals noted, "... the plain language of [the state court rule] does not give Koe the right to 'appeal' the Board's finding to the South Carolina Supreme Court." 12a. If the state court does not have jurisdiction to review the reprimand at petitioner Koe's request, it is questionable whether the reprimand, a decision of a state board, can be reviewed by this Court on direct review under 28 U.S.C. § 1257, or any other jurisdictional statute. Stern & Gressman, Supreme Court Practice (4th ed. 1969), §§ 3.20, 3.24.

Therefore, the crucial predicate of the Erdmann decision -- the availability of direct appellate review -- may be wholly lacking in the factual circumstances of the present case.

Therefore, the decision below, as intimated by the court of appeals, 16a, was effectively a holding that Petitioner Koe must exhaust state administrative remedies before bringing this suit pursuant to 42 U.S.C. § 1983. Any such requirement of exhaustion of state remedies is directly in conflict with numerous prior decisions of this Court. Houghton v. Shafer, 392 U.S. 639 (1968); King v. Smith, 392 U.S. 309 (1968); Damico v. California, 389 U.S. 416 (1967); McNeese v. Board of Education, 373 U.S. 668 (1963); see Gibson v. Berryhill, 411 U.S. 564, 581 (1973)(Marshall, J., concurring). Cf. also Burrell v. McCray, — U.S. —, 96 S.Ct. 2640 (1976). Even if exhaustion of administrative remedies were an appropriate requirement in this case, cf. Gibson v. Berryhill, supra, 411 U.S. at 574, the action of the courts below has caused it to occur, so that there is presently no bar to consideration of the matter in the district court.

B. This Court should grant the writ of certiorari to resolve a conflict among the circuits as to the applicability of the doctrine of comity to administrative disciplinary proceedings for non-criminal conduct.

The decision below accentuates a conflict among the circuit courts of appeals as to the applicability of the doctrine of Younger v. Harris, supra, and its progeny

to state bar disciplinary proceedings when such proceedings have not been brought before a state court.

The court of appeals for the fifth circuit has held that:

> ...when a Grievance Committee, by administrative action, undertakes merely to upbraid a local attorney for conduct deemed to be violative of the ethical standards of the profession, as provided in the Canons of Ethics, it is not in any sense acting in aid of the enforcement of Texas' criminal laws.
> Polk v. State Bar of Texas, 480 F.2d 998, 1002 (5th Cir. 1973).

Polk was also a case involving a Board which could administer a reprimand by administrative action, or could bring the matter before a state court for more severe discipline. 480 F.2d at 1001. The sixth circuit has also held, in a pre-Younger case involving a state procedure in Kentucky almost identical to that in South Carolina, that as long as the proceedings were before the State Bar Committee, and not yet referred to the state courts, the proceedings were not due the respect due to state judicial proceedings. Taylor v. Kentucky State Bar Assn., 424 F.2d 478, 482 (6th Cir. 1970).

In contrast, the court of appeals below, and the second circuit in Anonymous v. Association of the Bar of the City of New York, 515 F.2d 427 (2d Cir. 1975), have applied Younger because of the "interest

of the state court in adjudicating the continuing professional fitness and character of its own officers..." 515 F.2d at 432. However, the court below is the only circuit court to apply Younger to administrative board or committee proceedings on an alleged technical violation of professional ethics by conduct that was clearly altruistic; the conduct at issue in Anonymous was allegedly criminal conduct for which the attorney had been granted immunity from criminal prosecution in order to obtain his testimony before a state grand jury. (In Erdmann v Stevens, supra, the second circuit applied Younger to a non-criminal alleged ethical violation that was being heard in the state courts, not before a board or committee.)

II. The decision below is in conflict with prior decisions of this Court concerning standing to seek declaratory relief on behalf of an organization, regardless of proceedings pending against others.

The decision below is squarely in conflict with this Court's decision in Steffel v. Thompson, 415 U.S. 452 (1974) and NAACP v. Button, 371 U.S. 415 (1963), in denying the Petitioner American Civil Liberties Union the opportunity to litigate its claims for declaratory relief from the policy set out by the Board of Commissioners on Grievances and Discipline, on behalf both of the organization itself and of those of its attorney members who have not been the subject of professional disciplinary proceedings.

In NAACP v. Button, supra, this Court dealt squarely with the question of the legal standing of an organization similar

to Petitioner ACLU to assert First Amendment rights of association. The words of this Court then are equally applicable now, 371 U.S. at 428:

> ...petitioner claims that the [statute] infringes the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights. We think petitioner may assert this right **on** its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail. (Emphasis added.)

The court of appeals below entirely missed the gist of this principle, stating, 6a-7a:

> ...the ACLU clearly has no independent standing to challenge state disciplinary proceedings since no disciplinary proceedings can be brought against the ACLU itself.

However, the complaint in this action had alleged the following independent interest of the ACLU in the proceedings (paragraphs 12 and 13):

> The ACLU has in the past and intends in the future to educate laypersons to recognize their problems, to facilitate the

> process of intelligent selection of lawyers, and to assist in making legal services fully available.
>
> * * *
>
> [The disciplinary] complaint has the effect of ...chilling and discouraging the activities of the ACLU and the giving of solicited and unsolicited advice to lay persons that they should obtain counsel or take legal action. (Emphasis added.)

What logic is there in holding that proceedings pending against one member of an organization deprives the organization and all its members of an opportunity to seek prompt relief in a federal forum? In Dombrowski v. Pfister, 380 U.S. 479, 486 (1965), this Court noted that

> "[t]he threat of sanctions may deter...almost as potently as the actual application of sanctions...." ...Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overboard regulations risk prosecution to test their rights. For free expression--of transcendent value to all society, and not merely to those exercising their rights--might be the loser.

See also NAACP v. Button, supra, 371 U.S. at 434-35. In the instant case, the effect

of the federal court's action in staying its hand has been to deter ACLU attorneys in South Carolina, for almost two years, from offering to provide free representation to uneducated laypersons who are ignorant of their potential rights to judicial relief. Such activity is clearly protected under the First Amendment. NAACP v Button, supra; United Transportation Union v. Michigan, 401 U.S. 576 (1971); United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964). See dissenting opinion below, 24a-25a.

The decision below is further in conflict with Steffel v. Thompson, supra. In Steffel, the plaintiff, who had not been arrested, and his co-plaintiff, who had been prosecuted, had jointly engaged in distributing anti-war literature. The prosecution of the co-plaintiff, whose federal suit was dismissed, was voluntarily stayed pending the decision of Steffel's federal action. The practical effect of granting declaratory relief to Steffel was clear and immediate: if the statute were declared unconstitutionally applied to him, his handbilling companion would undoubtedly be freed from further prosecution. See also Roe v. Wade, 410 U.S. 113, 125-27 (1973), discussed in Steffel v. Thompson, supra, 415 U.S. at 471 n.19. In Steffel, this Court also cited with approval two court of appeals decisions in which state prosecutions were pending against certain persons, yet class actions were held to be maintainable on behalf of the class of persons threatened with proceedings but not presently subject to pending proceedings. Thoms v. Heffernan, 473 F.2d 478 (2d Cir. 1973); Lewis v.Kugler, 446 F.2d 1343, 1349 (3d Cir. 1971). See Steffel v. Thompson, supra, 415 U.S. at 458 n.8. More recently,

this Court has recognized the same practical possibility in Doran v. Salem Inn, Inc., supra.

Indeed, a forum for Petitioner ACLU was mandated by the fact that "no disciplinary proceedings can be brought against the ACLU itself." An affirmative lawsuit is the only way in which the ACLU can assert its organizational interests in the protected activity of offering free, unsolicited representation to laypersons.

III. The decision below is directly in conflict with decisions of this Court defining exceptions to the bar to the exercise of federal jurisdiction imposed by the doctrine of comity.

The decision below is also in conflict with the meaning attached to the irreparable injury requirement stated in Younger v. Harris, supra, as discussed in subsequent cases, such as Huffman v. Pursue, Ltd., supra. This Court has stated that even where there are pending state proceedings, entitled to respect under the doctrine of comity relied upon in Younger, the doctrine does

> ...allow intervention in those cases where the District Court properly finds that the state proceeding is motivated by a desire to harass or is conducted in bad faith or where the challenged statute is "flagrantly and patently violative of express constitutional prohibitions...." (Emphasis added.) Huffman v. Pursue, Ltd., supra, 420 U.S. at 611.

Thus, there are three separate exceptions to Younger: (1) a prosecution for purposes of harassment; (2) a prosecution conducted in bad faith, "without any hope of ultimate success, but only to discourage" constitutionally protected activity, Dombrowski v. Pfister, supra, 380 U.S. at 490; or (3) a prosecution under a statute "flagrantly and patently violative of express constitutional prohibitions." Petitioners alleged all of these exceptions to the doctrine of comity. The district court's opinion, adopted on these points by the court of appeals, recognized that exceptions had been sufficiently alleged, but held that irreparable injury could not be shown unless there were no "reasonable prospect that the state court would respect and satisfactorily resolve the constitutional issues raised." 41a. This additional requirement flies directly in the face of this Court's decision in Huffman, decided in the interim between the decision of the district court and the decision of the court of appeals. In Huffman, this Court expressly required that state appellate processes be exhausted, "unless [the federal plaintiff] established that early intervention was justified under one of the exceptions recognized in Younger." (Emphasis added.) 420 U.S. at 611. Indeed, the idea that proceedings have been brought "without any hope of ultimate success" contemplates that the appropriate state judicial officers will properly guard the federal plaintiff's rights, but this Court's decisions have established that where such prosecutorial bad faith is shown, the federal plaintiff need not wait upon state court proceedings for vindication. See opinion of Judge Winter below, 21a, footnote.

This Court has further recognized an important exception to the Younger doctrine

in the class of statutes that are "flagrantly and patently violative of express constitutional prohibitions." The doctrines of vagueness and overbreadth are well developed in the jurisprudence of this Court. Hynes v. Mayor of Oradell, ___ U.S. ___, 96 S.Ct. 1755 (1976); Lewis v. New Orleans, 415 U.S. 130 (1974); Gooding v. Wilson, 405 U.S. 518 (1972); Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); NAACP v. Button, supra. The present proceeding was initiated on a complaint charging that Koe's conduct was punishable as an "act ... or ... practice which tends to pollute the administration of justice or to bring the legal profession or the courts into disrepute." Although the Supreme Court Rule on which this complaint was based was enacted almost twenty years ago, it has never been authoritatively construed by the South Carolina Supreme Court in a manner to limit its application to avoid punishment of protected activity. In fact, the reprimand issued by the Board of Commissioners reflects a total disregard for the decisions of this Court, in purporting to impose discipline for conduct indistinguishable from that held protected by this Court in NAACP v. Button, supra, on behalf of an organization specifically mentioned in Button as one whose activities were protected. 371 U.S. at 440, n. 19.[4]

4. The Board purported to find Koe's conduct unprotected because an associate, with whom she shares office expenses, receives compensation from the ACLU, and the ACLU asks for attorneys fees in cases where such may properly be awarded according to law. But in NAACP v. Button, supra, the Court's opinion extended to the protection of staff attorneys of the NAACP and the Defense Fund, 371 U.S. at 420-21, 429 n. 11,
(footnote continued to next page)

In the present case, the federal plaintiffs are still waiting, almost two years later, and the state procedures have not yet brought the complaint before any court. The chilling effect on the ACLU and its associated attorneys continues unabated. The petitioners sufficiently alleged exceptions to the Younger doctrine to justify relief. These allegations must be accepted as true at this stage of the litigation. Jenkins v. McKeithan, 395 U.S. 411, 421-22 (1969); Gardner v. Toilet Goods Assn., 387 U.S. 167, 172 (1967); United States v. Mississippi, 380 U.S. 128, 143 (1965); Cooper v. Pate, 378 U.S. 546 (1964); Conley v. Gibson, 355 U.S. 41 (1957). Therefore, it was patently erroneous for the district court to dismiss this action in reliance upon Younger v. Harris.

(footnote 4 continued from preceding page)

434-35, 438-44, although the record clearly showed that they were compensated for their professional efforts in "solicited" cases, supra at 420, and the Supreme Court of Appeals of Virginia had found the state to be justified in preventing "fomenting and soliciting legal business.... which they channel to the enrichment of certain lawyers employed by them." 371 U.S. at 426.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1335

American Civil Liberties Union and Jane Koe,

Appellants,

versus

O. Harry Bozardt, Jr., H. Hayne Crum, Joseph O. Rogers, Jr., Marion H. Kinon, Edward M. Royall, II, George F. Coleman, Robert A. Hammett, Thomas J. Thompson, Coming B. Gibbs, Jr., Lowell W. Ross, Frank E. Harrison, J. Malcolm McLendon, C. Thomas Wyche, William L. Bethea, John B. McCutcheon, Melvin B. McKeown, Jr., individually and as members of the Board of Commissioners on Grievances and Discipline, and their successors; and the Attorney General of South Carolina,

Appellees.

Appeal from the United States District Court for the District of South Carolina, Columbia Division. Robert F. Chapman, District Judge.

Argued October 9, 1975. Decided Mar. 8, 1976.

Before BOREMAN and BRYAN, Senior Circuit Judges, and FIELD, Circuit Judge

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BOREMAN, Senior Circuit Judge:

One of the appellants, pursuing this action under the fictitious name Jane Koe, is an attorney licensed to practice law in South Carolina who performs legal services for the other appellant, the American Civil Liberties Union (hereinafter the ACLU). Koe and the ACLU seek federal equitable relief blocking state disciplinary proceedings initiated against Koe by the Board of Commissioners on Grievances and Discipline of the South Carolina Bar (hereinafter the Board). They contend that the Board's investigation of a complaint filed against Koe charging her with professional misconduct violates rights guaranteed by the first and fourteenth amendments to the Constitution of the United States and 42 U.S.C. §1983.

This action arose as a result of a complaint filed with the Board charging that Koe, by writing a letter to a prospective client offering the legal services of the

ACLU, performed acts which constituted solicitation and violated the Canons of Ethics adopted by the South Carolina Supreme Court. Koe contends that since her services for the ACLU are rendered without fee, she has not violated the Canons of Ethics, and that the investigation of the complaint by the Board and the Attorney General of South Carolina amounts to bad faith harassment intended to discourage the activity of the ACLU. Koe and the ACLU initiated this action in the federal district court seeking declaratory and injunctive relief preventing the Board from prosecuting or otherwise processing both the complaint filed against Koe and similar future complaint which may be filed against other ACLU attorneys. The Board moved for dismissal of the action. The district court, in a well reasoned opinion, granted the Board's motion to dismiss on the ground that federal relief was barred under

the principles set forth in Younger v. Harris, 401 U.S. 37 (1971), as applied by the Second Circuit in Erdmann v. Stevens, 458 F.2d 1205 (2 Cir.), cert. denied, 409 U.S. 889 (1972).

On appeal, Koe and the ACLU contend that even if Younger is a bar to the relief requested, the district court should have abstained and retained jurisdiction rather than dismissing the federal complaint. We find no merit in this argument. Abstention is generally held to be appropriate in cases in which both state and federal questions arise, and it is recognized that an action pending in state court will likely resolve state law questions which are dispositive of the federal claim. Harris County Comm'rs Court v. Moore, 420 U.S. 77 (1975). However, the Younger bar to federal intervention involves different considerations; it is recognized that when both state and federal questions are properly presented before a

state court in pending state criminal proceedings, see Younger, supra, or in certain pending state civil proceedings, see Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), principles of comity and federalism require that the federal courts not be permitted to interfere in the ongoing state proceedings. The underlying consideration of the Younger rule is the recognition that any federal claim properly asserted in and rejected by the state court is subject to review by the United States Supreme Court. 420 U.S. at 605. Since the federal claim will eventually be subject to consideration by the Supreme Court, abstention appears to have no application to cases in which Younger bars relief. In this regard, the Supreme Court has stated that "[u]nlike those situations where a federal court merely abstains from decision on federal questions until the resolution of underlying state issues... Younger v. Harris contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and

federal, to the state courts." Gibson v. Berryhill, 411 U.S. 564, 577 (1973). We are not aware of any authority which suggests that dismissal is inappropriate in cases in which Younger bars federal intervention, and the appellants have cited no cases which support such a position. Thus, we conclude that dismissal was appropriate upon the court's determination that Younger was a bar to federal intervention.

The ACLU further contends that even if dismissal of Koe's complaint was appropriate under Younger, dismissal of the ACLU's complaint was improper because there was no state proceeding pending directly against it. Although the district court opinion does not assign specific reasons for dismissal as to the ACLU, we conclude that the ACLU's complaint was properly dismissed.

In the instant case, the ACLU clearly has no independent standing to challenge

state disciplinary proceedings since no disciplinary proceedings can be brought against the ACLU itself. However, in Allee v. Medrano, 416 U.S. 802 (1974), the Court recognized that a labor union has standing as a named plaintiff to raise any claims that one of its members would have standing to raise under 42 U.S.C. §1983, if the union was in a position to suffer real injury derivatively when there was infringement upon the first amendment rights of its members. The ACLU contends that under Allee it has derivative standing in the instant case, but we find it unnecessary to reach this question since, even if the ACLU has standing, the relief sought by the ACLU would be barred by Younger v. Harris.

If the ACLU were found to have standing to assert rights of its associated attorneys derivatively, and this standing was asserted only on the basis of the injury to Koe, it is clear that the organization's action for

equitable relief would be subject to the same restrictions as Koe's action, since its rights would be derived entirely from Koe's rights. The ACLU contends, however, that it is also asserting rights of associated attorneys other than Koe who have no state proceedings pending against them, and are not burdened by the Younger restrictions. Since its other associated attorneys would not be subject to the Younger restrictions in a suit for federal equitable relief, the ACLU claims that it should not be subject to Younger. We reject this contention. The Supreme Court has held that persons not presently subjected to state proceedings may seek declaratory relief with respect to threatened prosecutions without meeting the requirements of Younger. Steffel v. Thompson, 415 U.S. 452 (1974). In Steffel, however, declaratory relief was sought by an individual; thus any federal equitable relief

which he received would affect only subsequent state proceedings initiated against him. In the present case, because federal equitable relief is sought by the ACLU on behalf of its members, a grant of federal relief would necessarily have an effect upon all ACLU associates, including Koe. To permit the ACLU to assert rights to those associates not bound by the Younger restrictions in order to obtain federal equitable relief which would necessarily benefit all its associates would directly interfere with the pending state proceedings, and have the effect of circumventing the Younger restrictions which bar Koe from seeking direct federal relief. We conclude that Allee and Steffel were not intended to be interpreted so as to permit a litigant to avoid Younger restrictions merely by joining his claim with claims of others asserting a joint interest.

After argument was heard on this appeal, Koe and the ACLU moved this court to remand their case to the district court, contending that action taken by the Board terminated the disciplinary proceedings against Koe and removed the necessity for federal "abstention." Because the district court did not "abstain," but rather dismissed the federal complaint on ground that Younger barred relief, we view this as a motion to remand on the ground that the Board's action removed the Younger bar to federal intervention.

In this motion to remand, Koe and the ACLU allege that after this appeal was filed the investigating panel recommended that Koe be given a "private reprimand" which was administered by the Board on January 9, 1976.[1]

1. At oral argument Koe's counsel tendered documents to the court which he represented to be copies of the investigating panel's confidential report and recommendation. The Board's counsel objected and we ordered these documents sealed and retained by the clerk pending our determination of what action
[footnote continued to next page]

They argue that because the administration of the "private reprimand" has the effect of ending the state disciplinary proceeding and no "appeal" is provided to the state courts from this "private reprimand," the Younger considerations of comity and federalism which barred the district court from considering the case no longer exist. The Board counters this argument by asserting that because section 34 of the South Carolina Supreme Court's Rule on Disciplinary Procedure recognizes that court's authority to require certification to it of the record in any disciplinary proceeding "for such action as it deems proper," there has been no final state determination in these disciplinary

[footnote 1 continued from preceding page]

should be taken with respect thereto. Having concluded that the report could not affect this decision, we direct that the sealed documents be returned to appellant's counsel.

proceedings.[2] The Board argues further that since Koe may still seek certification for review from the state Supreme Court, she has not exhausted her state remedies, and that Younger continues to bar federal intervention.

We think that the plain language of section 34 does not give Koe the right to "appeal" the Board's finding to the South Carolina Supreme Court. This recently adopted section serves only to bolster earlier interpretations by the South Carolina Supreme Court holding that it has the ultimate responsibility to resolve all disciplinary proceedings. We find section 34 entirely consistent with prior judicial pronouncements of that court

2. Section 34 of the South Carolina Supreme Court's Rule on Disciplinary Procedure, as amended June 12, 1975, states:

> Nothing in these rules shall be construed to deprive the Supreme Court of the authority to require the certification to it of the record in any case, for such action as it deems proper.

that

> [the members of the Board are] commissioned and charged with the duty of investigating alleged misconduct on the part of their fellow members of the bar of this State and of reporting to this court the proceedings of their inquiry, and their findings and recommendations; that the Board's report is advisory only, this court being in nowise bound to accept its findings of fact or to concur in its recommendations; and upon this court alone rests the duty and the grave responsibility of adjudging, from the record, whether or not professional misconduct has been shown, and of taking appropriate disciplinary action thereabout.

Burns v. Clayton, 237 S.C. 316, 117 S.E.2d 300 (1960).

Koe's argument appears to be based upon her interpretation of the provisions of section 11 of the Rule on Disciplinary procedure, which states that, upon a finding by the Board that the attorney is guilty of misconduct, the Board may administer a "private reprimand."[3] Since there is no

3. Section 11 of the South Carolina Supreme Court's Rule on Disciplinary Procedure, as amended June 12, 1975, states, in pertinent
[footnote continued to next page]

provision in any other section of the South Carolina Supreme Court's Rule on Disciplinary Procedure under which one who is subjected to a "private reprimand" may obtain a review by

[footnote 3 continued from preceding page]

part:

> Upon consideration of the report of the panel, and the showing made to the Board, the Board of Commissioners may:
>
> (a) Refer the matter back to the panel for further hearing; or
>
> (b) Order a further hearing before the said Board of Commissioners; or
>
> (c) Proceed upon the certified report of the prior proceedings before the panel.
>
> Upon its final review, the Board of Commissioners may either dismiss the complaint or find that the respondent is guilty of misconduct. If the Board shall determine that a private reprimand shall be administered, it shall administer such reprimand. If the complaint is dismissed or if a private reprimand is administered, the Secretary of the Board of Commissioners shall thereupon so notify the respondent, the complainant, all counsel of record, and, when deemed appropriate, and requested in writing by the respondent, the local Bar Association . . . .

that court, Koe contends that the Board's administration of a "private reprimand" has the effect of rendering final judgment on her case. If section 11 is interpreted as Koe urges, there appears to be an ambiguity between it and section 34, which clearly recognizes the power of the highest state court to review the Board's findings in any proceeding. We find, however, that the provisions of the Rule may be read without conflict if the "findings" of the Board are always considered advisory. Our reading of both Burns, supra, and section 34 convinces us that even a "private reprimand" administered under section 11 is to be considered merely advisory until sustained or acquiesced in by the state Supreme Court. Thus, we conclude that there is no final state determination in any disciplinary proceeding until such time as the South Carolina Supreme Court indicates, expressly or by implication, that the Board's findings will either be rejected or permitted to stand.

Koe's state remedies are not exhausted until such time as the disciplinary proceedings become final and, until her state remedies are exhausted Younger v. Harris bars both Koe and the ACLU from seeking equitable relief.[4] Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). In the present case, a final state adjudication of the disciplinary proceedings will not occur until it can be demonstrated that the South Carolina Supreme Court has either expressly decided the question or acquiesced in the decision of the Board.[5] Since Koe and the ACLU have shown neither of the above, the motion to remand is denied.

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4. We do not reach the question in the present case as to whether either Koe or the ACLU may renew the action for federal equitable relief if the Board's interpretation of the Canons of Ethics is sustained by the state Supreme Court. Thus, we express no opinion as to what relief would be appropriate under those circumstances.

5. We suggest that if the South Carolina Supreme Court should fail to certify Koe's case upon its own motion as permitted by section 34, Koe may obtain finality by requesting review
[footnote continued to next page]

We affirm the holding of the district court that Younger v. Harris bars federal intervention in these state disciplinary proceedings, for the reasons stated in the district court's opinion, ___ F.Supp. ___ (D.S.C. 1974), and as amplified herein.

Affirmed

[footnote 5 continued from preceding page]

by that court. If review is denied or no action is taken within a reasonable period, this would have the effect of affirming the Board's findings.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1335

[Filed April 30, 1976]

American Civil Liberties Union and Jane Koe,

Appellants,

versus

O. Harry Bozardt, Jr., H. Hayne Drum, Joseph O. Rogers, Jr., Marion H. Kinon, Edward M. Royall, II, George F. Coleman, Robert A. Hammett, Thomas J. Thompson, Conning B. Gibbs, Jr., Lowell W. Ross, Frank E. Harrison, J. Malcolm McLendon, C. Thomas Wyche, William L. Bethea, John B. McCutcheon, Melvin B. McKeown, Jr., individually and as members of the Board of Commissioners on Grievances and Discipline, and their successors; and the Attorney General of South Carolina,

Appellees.

O R D E R

Upon consideration of the petition for rehearing it is ORDERED, with the consent and approval of Judge Bryan and Judge Field, that the petition for rehearing be and the same hereby is denied.

Upon consideration of the suggestion for a rehearing in banc, a poll of the court having been requested by a regular active member of

the court, it was established that a majority of the regular members of the court in active service did not favor rehearing in banc,

NOW, THEREFORE, IT IS ORDERED that the suggested rehearing in banc be and the same hereby is denied.

For the court:

s/ Herbert S. Boreman
Senior United States
Circuit Judge.

WINTER, Circuit Judge, dissenting:

I dissent from the denial of rehearing in banc.

This is a classic case for such treatment. It presents a question of exceptional importance, Rule 35(a), F.R.A.P., and there is substantial reason to conclude that the case is wrongly decided.

I.

The panel holds that the principles set forth in Younger v. Harris, 401 U.S. 37 (1971), and its progeny, oust federal jurisdiction of an action under 42 U.S.C. § 1983 for declaratory and injunctive relief where there is pending a state administrative proceeding, the object of which is to determine if the individual plaintiff should be subjected to disciplinary action, not criminal sanctions, for alleged misconduct as a member of the

bar.* What is at stake in the state proceedings is the right of a licensee to practice her profession; there is no claim that, if the individual plaintiff did the things with which she is charged, any criminal statute of South Carolina was infringed.

Under presently decided controlling authorities, the outermost reach of the Younger principle of federal non-intervention was Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), which held that a district court should not exercise jurisdiction to determine the constitutionality of a statute making a

* At the outset, I express serious reservations that even if Younger applies, it would support the result reached by the majority. Younger appears to recognize that it is inapplicable where a plaintiff shows "bad faith, harassment, or any other unusual circumstance that would call for equitable relief." 401 U.S. at 54. The complaint was dismissed notwithstanding plaintiffs' allegations that the disciplinary inquiry "was initiated against plaintiff Koe in bad faith for purposes of, and has the effect of, harassment and retaliation and chilling and discouraging the activities of ACLU and the giving of solicited and unsolicited advice to lay persons that they should obtain counsel or take legal action."

movie theatre which shows obscene films a nuisance and requiring its closing when there was pending an earlier filed state civil proceeding under the statute. Huffman recognized federal civil injunctive relief ought to be more conservatively granted when the object of relief was a state officer enforcing a state statute than in a case between private litigants--a concept implicit in Younger--but that Younger rested also "upon the traditional reluctance of courts of equity . . . to interfere with a criminal prosecution." 420 U.S. at 604. Thus, the rationale articulated in Huffman was that

> [W]e deal here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding ... while in

> this case the District Court's injunction has not directly disrupted Ohio's criminal justice system, it has disrupted that State's efforts to protect the very interests which underlie its criminal laws and to obtain compliance with precisely the standards which are embodied in its criminal laws. 420 U.S. 604-05.

Huffman does not govern this case, and Younger should not be applied here. Although the district court ought not to enjoin the administrative proceeding unless the plaintiffs' right to relief is free from doubt, I see no basis on which to say that federal jurisdiction is ousted because the proceeding is criminal or quasi-criminal in nature. I think that the panel's decision flies in the teeth of Mitchum v. Foster, 407 U.S. 225 (1972) (holding that an action under 42 U.S.C. § 1983 was an exception to the anti-injunction statute, 28 U.S.C. § 2283); Gibson v. Berryhill, 411 U.S. 564 (1973) (holding that a federal court could enjoin a proceeding before the Alabama Board of Optometry where, as here, plaintiffs allege bias and harassment); and

Steffel v. Thompson, 415 U.S. 452 (1974) (holding that declaratory relief, such as that prayed here, could be granted where a state criminal prosecution was threatened but not pending.) See also Taylor v. Kentucky State Bar Assoc., 424 F.2d 478, 482 (6 Cir. 1970) (holding that bar disciplinary proceedings at the administrative level are not "proceedings in a state court.")

II.

Only the individual plaintiff is the subject of the state administrative inquiry; the ACLU is not. Yet the latter has a substantial interest in the state proceedings. The impact of the state proceedings on the willingness of lawyers to volunteer and cooperate with ACLU in providing legal assistance to those whose constitutional rights have been violated is manifest. The services of ACLU--assisting lay persons to recognize their legal rights and making counsel available-- are the very services for which the

individual plaintiff is sought to be disciplined and they are constitutionally protected activities. United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963). See In re Ades, 6 F.S. 467, 475-76 (D. Md. 1934), for a persuasive historical compilation by a district judge, later a distinguished member of this court.

It seems to me that under these circumstances Steffel holds that even if Younger is a bar to jurisdiction over the claim of the individual plaintiff, the claim of ACLU can and should be litigated. See also Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975).

III.

Thus, I would conclude that for these several reasons the panel's decision is incorrect. We should grant rehearing in

banc and reach a different result.

Judge Craven and Judge Butzner authorize me to say that they join in these views.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

American Civil Liberties Union and Jane Koe,	)	
Plaintiffs,	)	Civil Action No. 74-1703
vs.	)	
	)	O R D E R
O. Harry Bozardt, Jr., H. Hayne Crum, Joseph O. Rogers, Jr., Marion H. Kinon, Edward M. Royall, II, George F. Coleman, Robert A. Hammett, Thomas J. Thompson, Coming B. Gibbs, Jr., Lowell W. Ross, Frank E. Harrison, J. Malcolm McLendon, C. Thomas Wyche, William L. Bethea, John B. McCutcheon, Melvin B. McKeown, Jr., individually and as members of the Board of Commissioners on Grievances and Discipline, and their successors; and the Attorney General of South Carolina,	)	
Defendants.	)	

This action is brought by American Civil Liberties Union, hereinafter referred to as ACLU, and Jane Koe, hereinafter referred to as Koe, who is a practicing attorney in Richland County, South Carolina, and is using the fictitious name of Jane Koe to protect

her privacy and professional reputation. The plaintiffs ask this Court to enjoin the Attorney General of South Carolina and the members of the Board of Commissioners on Grievances and Discipline, hereafter referred to as Board, who are appointed and elected pursuant to the Rule for Disciplinary Procedure of the South Carolina Supreme Court. The complaint also seeks costs, plus attorneys' fees and a declaration by the Court that the pending complaint against Koe before the Board is in violation of her rights under the First and Fourteenth Amendments to the Constitution of the United States.

The defendants have moved to dismiss the action on five separate grounds, but since the dismissal will be granted, it is necessary to discuss only the grounds supporting dismissal.

On October 10, 1974, Koe received a notice and a complaint from the secretary

of the Board, which complaint alleges on information and belief that Koe committed an act of misconduct as an attorney by writing a letter dated August 30, 1973, to an individual in Aiken, South Carolina, which the secretary of the Board considered to be a solicitation in violation of the Canons of Ethics. The complaint prays "that the Board of Commissioners on Grievances and Discipline consider these allegations and make such disposition as may be appropriate."

Koe contends that since she is associated with the ACLU as a cooperating attorney, is an officer of the South Carolina affiliate of the ACLU and serves in both capacities without fee or pay or any expectation thereof and since she had no financial interest or expectation of gain or reward in connection with the correspondence or any representation that may have been produced thereby, she is not quilty of violating any of the Canons of Ethics and the action of the Board amounts

to harassment, was taken in bad faith and for the purposes of chilling and discouraging the activities of the ACLU and the giving of solicited and unsolicited advice to lay persons that they should obtain legal counsel or take legal action, when their rights are being violated or threatened with violation.

The complaint alleges in part:

"7. Prior to August 30, 1973, plaintiff Koe was contacted by a Mr. Gary Allen, of whom she had prior knowledge and knew to be acting on behalf of a Mrs. M.W. with apparent and actual authority to so act. He requested that plaintiff Koe or the ACLU undertake to represent Mrs. M.W. in an action against certain persons who procured, performed, or authorized her sterilization. In response to such request, she wrote Mrs. M.W. on August 30, 1973, stating the willingness of the ACLU to undertake to secure her representation.

8. Plaintiff Koe talked thereafter with Mrs. M.W. on several occasions about her proposed law suit. However, Mrs. M.W. elected not to proceed with litigation and plaintiff Koe's involvement with her was terminated. Other women residing in Aiken, South Carolina, however, who had been sterilized or threatened with sterilization, elected to proceed with

litigation and filed a damage action through lawyers associated with the ACLU, in Doe v. Pierce, Civ. No. 74-475, D.S.C. Plaintiff Koe does not represent any of the parties in Doe v. Pierce, nor has she any direct involvement in that case.

9. Upon information and belief, attorneys representing some of the defendants in Doe v. Pierce secured a copy of the August 30, 1973, letter from plaintiff Koe to Mrs. M.W. and attempted to raise as a defense in that suit that the action was barred or rendered unlawful because of solicitation. On September 24, 1974, during the deposing of one of the plaintiffs in Doe v. Pierce, Honorable Sol Blatt, Jr., who had knowledge of the August 30, 1973, letter, permitted certain questions to be propounded to that witness involving her contacts with plaintiff Koe, but solely as to the issue of the appropriateness of the suit as a class action. The court ruled that plaintiff Koe had not committed solicitation as follows:

Judge Blatt: All right, now let the record show that the other question presented to the Court was the question pertaining to this witness as to how she came to meet or to know [Jane Koe] and so this record will be clear and recognize that the Court may clear it some that this question probably goes to the issue of solicitation. This Court feels in its posture of the American Civil Liberties Union has a duty

and an obligation under the manner in which it operates to seek out and help those who it feels are not able to help themselves, either their lack of knowledge or lack of funds, the Court finds no fault with the situation out of which this suit arose with the attorneys connected with the ACLU, in contacting if that in fact did happen, the plaintiffs but the Court feels that the issue of contact or solicitation does go to the question of validity or the appropriateness of a class action. Because of that and only because of that this Court feels that it is an appropriate question to ask this plaintiff."

Plaintiffs allege that the above mentioned "ruling" of Judge Blatt involving the alleged solicitation by plaintiff Koe was withheld from the Board by the Attorney General of South Carolina or his attorneys at the time the complaint was initiated.

The letter from plaintiff Koe to Mrs. M.W. contained the following paragraph:

> "You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a lawsuit on your behalf for money against the doctor who performed

> the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on."

The Board contends that this paragraph constitutes a solicitation in violation of the Canons of Ethics. This is the charge Koe is called upon to answer before the Board.

The above letter was dated August 30, 1973. The letterhead showed "Carolina Community Law Firm" with a Columbia address. The names of four attorneys were listed on the letterhead and Koe signed the letter as "Attorney-at-Law". Although the above quoted paragraph mentions ACLU, there is no indication in the letter that Koe is acting on behalf of the ACLU, is an officer, employee, cooperating attorney or in any way connected with ACLU.

The Supreme Court of South Carolina has adopted a "Rule on Disciplinary Procedure" pursuant to its authority to discipline, suspend and disbar attorneys at law. The

South Carolina Constitution Article V., Section 4 and South Carolina Code of Laws (1962) §56-96.

The defendants, except the Attorney General of South Carolina, are the duly appointed and acting members of the Board of Commissioners on Grievances and Discipline appointed by the South Carolina Supreme Court for the purpose of investigating and making recommendations to the Court in disciplinary actions as provided by the aforementioned rule. The duties and responsibilities of the Board have been expressed by the Court in Burns v. Clayton, 237 S.C. 316, 177 SE 2d 300 (1960) as follows:

> ". . . The Board of Commissioners on Grievances and Discipline are officers of this Court, commissioned and charged with the duty of investigating alleged misconduct on the part of their fellow members at the Bar of this State and of reporting to this Court the proceedings of their inquiry, and their findings and recommendations .... The Board's report is advisory only, this Court being in no wise bound to accept its recommendation; and upon this

> Court alone rests the duty and the grave responsibility of adjudging, from the record, whether or not professional misconduct has been shown, and of taking appropriate and disciplinary action thereabout."

The Rule on Disciplinary Procedure provides that unless a complaint filed with the Board does not on its face state facts sufficient to charge misconduct, the secretary of the Board shall cause a copy of the complaint together with a notice to be mailed to the attorney charged. The attorney then has 20 days within which to file an answer to the complaint. After filing of the answer a formal hearing is held upon reasonable notice to the complainant and the attorney before a panel of three commissioners appointed by the chairman of the Board. No member of the panel may be a resident of the judicial circuit in which the complaint originated or the judicial circuit in which the respondent resides. The rules also provide the chairman of the Board may request

the Attorney General's office to handle prosecution of a claim before the hearing panel.

The attorney charged in the complaint has the right to appear, be represented by an attorney of his choosing, present witnesses and evidence, testify himself, cross examine the complaint and complainant witnesses and due process is observed.

If the panel finds the attorney guilty of misconduct warranting only private reprimand, the panel administers such reprimand. However, if the panel finds misconduct meriting public reprimand, indefinite suspension or permanent disbarment, the recommendation goes to the full Board which shall hear the matter after due notice to the parties and the submission of briefs and the presentation of oral argument in opposition to the recommendations of the panel. If the Board concurs in the finding of misconduct and the administering of discipline of more than

private reprimand, the matter is then referred to the Supreme Court of South Carolina and the respondent attorney is again given the opportunity to be heard. Until the proceedings are filed in the Supreme Court they are private, not open to the press or the public, unless the respondent requests in writing that they be made public.

Subsequent to receiving the notice and complaint from the Board, Koe and the ACLU filed the present action to enjoin the proceedings, and no further steps have been taken by the Board awaiting the disposition of the motion to dismiss the present suit.

In opposition to the defendant's motion to dismiss, plaintiffs have filed a 35 page brief, citing 154 different decisions, together with 13 pages of attachments to the brief. For all of this effort, plaintiffs do not distinguish their suit from the holding of the Second Circuit in Erdmann v. Stevens, 458 F.2d 1205 (1972). Little or

no effort was made by the plaintiff to advise this Court of why it should not apply Erdmann, and no suggestions have been made as to how this Court can ignore it. The Erdmann case is so similar in applicable law and its reasoning is so sound and persuasive, that it answers every question or position raised by the plaintiff, except the rather weak argument of res judicata and collateral estoppel.

Erdmann was an attorney practicing in New York and brought his suit to enjoin the conduct of disciplinary proceedings against him by members of the Appellate Division, First Department, of the State of New York. The disciplinary proceedings arose out of remarks made by the attorney in a magazine article highly critical of the judges of the New York courts. He asserted that the purpose of the disciplinary proceeding was to discourage and prevent his exercise of his first amendment rights and that the same violated his rights to equal protection and due

process. These are the basic claims of Koe and the ACLU in the present action.

Erdmann attempted to enjoin the judges of the court after they had refused to accept the recommendation of the Committee on Grievances of the Association of the Bar of the City of New York. The present plaintiffs attempt to enjoin the proceedings even before they are heard by the Board. In refusing the injunction and dismissing the action the Second Circuit wisely applied Younger v. Harris, 401 U.S. 37 (1971), and this Court must do the same.

It is rare to find a decision of another court which is so helpful.

After finding it had jurisdiction in the action, the Erdmann court stated at page 1208:

> "The principal issue is whether, in view of the policy expressed by the Supreme Court recently in the sextet of cases headed by Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), (footnote with names of other five cases omitted) Erdmann's

complaint and supporting papers state facts entitling him to injunctive relief. In Younger, the Supreme Court denied federal injunctive relief against a pending state criminal prosecution and held that because of the strong policy in favor of 'the notion of "comity," that is a proper respect for state functions' and the Constitution's creation of a system in which the sensitivity of both state and federal courts must be recognized and balanced, such intervention should be permitted only under extraordinary circumstances, such as where the state proceedings have been instituted or prosecuted in bad faith or as part of a campaign of harassment which, unless restrained, would cause grave and irreparable injury without providing any reasonable prospect that the state court would respect and satisfactorily resolve the constitutional issues raised. See, e.g. Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). In thus reaffirming the long-established policy against federal intervention, see Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L. Ed. 138 (1951); Cleary v. Bolger, 371 U.S. 392, 83 S.Ct. 385, 9 L.Ed.2d 390 (1963), it was recognized that unless intervention were severely restricted, alert counsel would resort to federal relief as a readily available means of disrupting or subverting legitimate state prosecutions in which constitutional issues could

> be resolved by competent state trial and appellate tribunals."

Although Koe alleges bad faith and harassment in the complaint, this is not sufficient, since under Younger, she must also show that unless restrained the proceedings "would cause grave and irreparable injury without providing any reasonable prospect that the state court would respect and satisfactorily resolve the constitutional issues raised." In discussing irreparable damage at page 1210, Erdmann states:

> "The Appellate Division's institution of disciplinary proceedings against him admittedly represents the exercise of a function exclusively vested in it and falls far short of the Dombroski -type campaign of harassment and 'official lawlessness' described by the Supreme Court in Younger as the kind of exceptional or extraordinary circumstances warranting federal intervention. Furthermore, there is an absence of any evidence of irreparable injury of the type warranting relief under Younger, which requires proof of injury substantially in excess of that normally considered sufficient to invoke equitable relief. In

noting that to justify federal relief against a state prosecution the injury must be 'both great and immediate,' Justice Black there stated:

> 'Certain types of injury, in particular, the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered "irreparable" in the special legal sense of that term. Instead, the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution.' (citation omitted).

The injury alleged here is no more than that incidental to any single prosecution of a quasi-criminal nature. There is no reason to assume that Erdmann's constitutional rights will not be protected by the Appellate Division, Third Department, to which the disciplinary proceedings against him have been transferred for adjudication, or, if further review becomes necessary, by the New York Court of Appeals. The competency of New York state courts to decide questions arising under the federal Constitution, by which we are all governed, is beyond question. In the unlikely event that both of these state appellate courts apply improper standards, Erdmann could seek Supreme Court review by petition for writ of certiorari. Undoubtedly because of general recognition of the advisability of permitting

state courts first to act with respect to the delicate relationship between themselves and their officers, the traditional method of obtaining adjudication of federal constitutional questions arising out of such disciplinary proceedings has been by way of the state appellate court route to the Supreme Court rather than by direct federal intervention at the initial stages. See, e.g., Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); Konigsberg v. State Bar of California, 353 U.S. 252, 77 S.Ct. 722, 1 L.Ed. 2d 810 (1957); Spevack v. Klein, supra; Matter of Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963)."

This Court cannot follow the plaintiffs' contention that Judge Blatt in his comments quoted above from Doe v. Pierce, decided the issue of solicitation in such a manner that it has become res judicata or acts as a collateral estoppel binding upon either the Board or the Supreme Court of South Carolina.

The recepient [sic] of the letter from Doe was not a party to that case. Plaintiff

Koe did not represent any party [to sic] that action and was not directly involved therein. There is no indication that she was questioned by the attorneys or by Judge Blatt. Certainly the Judge was not conducting a hearing as to possible disciplinary actions at the time he made his statement, which makes it clear that he was allowing questions as to solicitation, solely because it might go to the issue of the validity or appropriateness of the class action.

A United States District Judge sitting alone could not bind the South Carolina Supreme Court on what disciplinary inquiry it might make into the affairs of an attorney admitted to practice in South Carolina by the South Carolina Supreme Court, and subject to the Canons of Ethics adopted by that court. This is particularly true where the issue of solicitation is raised collaterally to the matter before the

Federal Judge. See Ginger v. Circuit Court for County of Wayne, 372 F.2d 621 (6th Cir. 1967), at page 625:

> "A Federal District Court has no original jurisdiction of a proceeding disbarring an attorney from practice in state courts, though in the state court proceeding the attorney may raise questions based upon his rights under the federal Constitution for eventual review by the United States Supreme Court under its certiorari jurisdiction."

The complaint alleges in paragraph 14: "The Board has no authority to supervise or discipline the conduct of attorneys in their practice before the courts of the United States." While it is possible, but rather unlikely, an attorney could practice before the federal courts after being disciplined, suspended or disbarred by the State Supreme Court. However, this does not mean an attorney's actions in obtaining, preparing or presenting cases in the federal court are exempt from the State Canons of Ethics, and such actions are not shielded from the

scrutiny, concern and control of the State Supreme Court, which has the responsibility for maintaining the high standards of the legal profession and the integrity of the Bar.

The relationship between the Court and attorneys admitted to practice before it is summarized by Justice Frankfurter in Theard v. United States, 354 U.S. 278 (1957):

> "The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. The matter was compendiously put by Mr. Justice Cardozo, while Chief Judge of the New York Court of Appeals.
>
> '"Membership in the bar is a privilege burdened with conditions" (Matter of Rouss 221 N.Y. 81, 84, 116 N.E. 782, 783). The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.'"

Koe was originally admitted to the practice of law by the Supreme Court of South Carolina, and as a practicing attorney she must maintain the high standards of the profession she has chosen. This United States District Court will not now interfere with the investigation by the Board, an arm of that Supreme Court, as it determines whether Koe has conducted her professional affairs in keeping with the Canons of Ethics.

Since the complaint fails to state facts entitling plaintiffs to federal intervention, the same must be and is hereby dismissed.

AND IT IS SO ORDERED.

s/ Robert F. Chapman
ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE.

December 23rd, 1974

Florence, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

[Filed January 24, 1976]

American Civil Liberties Union and Jane Koe,	)	
Plaintiffs,	)	Civil Action No. 74-1703
vs.	)	
O. Harry Bozardt, Jr., H. Hayne Crum, Joseph O. Rogers, Jr., Marion H. Kinon, Edward M. Royall, II, George F. Coleman, Robert A. Hammett, Thomas J. Thompson, Coming B. Gibbs, Jr., Lowell W. Ross, Frank E. Harrison, J. Malcolm McLendon, C. Thomas Wyche, William L. Bethea, John B. McCutcheon, Melvin B. McKeown, Jr., individually and as members of the Board of Commissioners on Grievances and Discipline, and their successors; and the Attorney General of South Carolina,	)	O R D E R
Defendants.	)	

This matter is before the Court upon motion of the plaintiffs under Rule 59(e), Federal Rules of Civil Procedure, to alter or amend the Order of December 24, 1974, dismissing this case. The present motion is supported by an affidavit and a memorandum of authorities.

The plaintiffs contend that the affidavit of M.W. supports their clair of bad faith of the defendants and retaliation against the plaintiff Jane Doe in bringing the complaint against her before the Commissioners on Grievances and Discipline. The Court has reviewed the affidavit and finds nothing contained therein which offers any support to plaintiffs' claim of bad faith or retaliation on the part of the defendants. It appears that the present motion, which does not set out the specifics of the alteration or amendment desired is in effect a motion to **reverse** the December 24, 1974 Order, but regardless of its intent, it is not supported by any new evidence or legal authorities which would cause any amendment or change to the prior Order of the Court.

At a hearing before the Court on January 23, 1975, the plaintiffs also requested the Court to retain jurisdiction of the matter

until after the proceedings before the Board of Commissioners on Grievances and Discipline had been completed. However, the Court finds no useful purpose would be accomplished by retaining jurisdiction. If the plaintiffs wish to test their legal position at the court of last resort, this can be accomplished much more quickly by appeal from the South Carolina Supreme Court to the United States Supreme Court than by going through this court, the Court of Appeals and then the Supreme Court.

IT IS, THEREFORE, ORDERED that the motion to amend or alter the December 24, 1974 Order of this court be and the same is hereby denied and the motion for this court to retain jurisdiction is also denied.

AND IT IS SO ORDERED.

s/ Robert F. Chapman
ROBERT F. CHAPMAN
UNITED STATES DISTRICT JUDGE

January 23rd, 1975

Columbia, South Carolina

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment One:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION, Amendment Fourteen:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42, Section 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Supreme Court of South Carolina, Rule on Disciplinary Procedure, Section 4:

4. Misconduct Defined.

Misconduct, as the term is used herein, means any one or more of the following:

(a) violation of any provision of the oath of office taken upon admission to the practice of law in this State;
(b) violation of any of the Canons of Professional Ethics as adopted by this Court from time to time;
(c) commission of a crime involving moral turpitude;
(d) conduct tending to pollute or obstruct the administration of justice or to bring the courts or the legal profession into disrepute.
(e) emotional or mental stability so uncertain, as in the judgment of ordinary men, would render a person incapable of exercising such judgment and discretion as necessary for the protection of the rights of others and/or their property or interest in property.

American Bar Association, Code of Professional Responsibility, adopted by Supreme Court of South Carolina, Disciplinary Rule 2-103(D):

DR 2-103 Recommendation of Professional Employment.

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following,

provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(1) A legal aid office or public defender office:
(a) Operated or sponsored by a duly accredited law school.
(b) Operated or sponsored by a bona fide non-profit community organization.
(c) Operated or sponsored by a governmental agency.
(d) Operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association representative of the general bar of the geographical area in which the association exists.

(4) A bar association representative of the general bar of the geographical area in which the association exists.

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:
(a) The primary purposes of such organization do not include the rendition of legal services.

(b) The recommending, furnishing, or paying for legal services to its members is incidental and reasonably related to the primary purposes of such organization.

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

(d) The member or beneficiary for whom the legal services are rendered, and not such organization, is recognized as the client of the lawyer in that matter.